Nos. 22541 A-G, 22574, 22575, 22576 A-L, 22577A, 22578 A-C

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

AMERICAN PIPE AND CONSTRUCTION CO.,

Appellant,

vs.

THE STATE OF CALIFORNIA, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURTS FOR THE: NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DISTRICT OF CALIFORNIA, WESTERN DISTRICT OF WASHINGTON, AND DISTRICT OF OREGON

BRIEF FOR THE APPELLEES

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JURISDICTION

This Court has jurisdiction of this proceeding under 28 U.S.C. § 1651 (a) and under this Court's order of February 5, 1968 consolidating cases and directing that these proceedings "shall be considered in the nature of mandamus."[1]

*As these proceedings are "in the nature of mandamus" the parties are technically Petitioner and Respondents. Respondents, however, for the sake of consistency, will refer to the parties herein as Appellant and Appellees.

[1]The briefs filed upon Appellant's motion for a stay fully argued the "collateral appeal" doctrine. Appellees assume that the order entered herein on February 5, 1968 has decided that issue. Appellees concur in the determination of this court that it may consider the abortive attempt to appeal as a proceeding in mandamus and hence appellees propose no argument upon points III and IV of appellant's brief.

COUNTER STATEMENT OF THE CASE

Twenty-seven "Pipe Cases" have been pending in five separate district courts of this Circuit for three years or more. The plaintiffs include three states and approximately 150 state agencies, cities, counties and other municipal corporations. Their claims against defendant are for damages resulting from alleged price fixing and other violations of the antitrust laws. Some 2200 purchase transactions with defendant will be involved in the proof of conspiracy and damage.

Pursuant to 28 U.S.C. § 292 (b) the Chief Judge of this Circuit designated Judge Martin Pence "to hold a district court" in each of the districts in which the "Pipe Cases" were filed.[2] 28 U.S.C. § 137, provides that:

> "The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court."

Judge Pence undertook the responsibility for all twenty-seven cases in all the districts under that statute.[3]

No one except Appellant has ever assumed that the initial assignment of cases to Judge Pence was irrevocable or no longer subject to the rules or or-

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[2]Judge Pence may also have been designated to hold a district court in still other districts; and there are "Pipe Cases" in other circuits.

[3]Appellant repeatedly states that the cases were assigned to Judge Pence "for all further proceedings" by the Chief Judge of each district. There is no authority whatsoever in the record for any such assertion. The record shows only a handful of orders, mostly relating to dismissed cases, a clerk's notation on the docket and a memorandum from Judge Boldt, who is not the chief judge of the district in which he is a judge. Appellees presume that Judge Pence acquired responsibility for the pipe cases as the statute provides in "accordance with the rules and orders" of the respective District Courts.

ders of the district courts as provided by statute. Appellant now concedes that it has no vested right to have Judge Pence try all cases—concededly an impossible task—and it is thus obvious that the cases may be re-transferred or re-assigned by any lawful procedure.

In November of 1966 Judge Pence first advanced the idea of conducting three "practically simultaneous trials" in Seattle, San Francisco and Los Angeles. After extensive pretrial hearings and argument, that concept was formalized in pretrial order No. 9 entered February 21, 1967. In giving content to that idea, Judge Pence has for the last sixteen months mentioned Judges Boldt and Zirpoli as having expressed willingness to try other cases and willingness to meet for the purposes of coordinating the trials of the cases. The manifest purpose of such a meeting was to avoid unnecessary delay and conflicts in rulings, and to coordinate the appearance of witnesses and parties, as well as to deal with all of the other problems that might arise from lack of careful and deliberate attention to multidistrict cases.

That concept in subsequent orders embodying the identical or similar terms, excepting only dates, was carried forward through pretrial order No. 12[4] and pretrial order No. 14. On February 5, 1968, this court ordered that the appeal taken from the entry of pretrial order No. 14 be considered "in the nature

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[4]Appellant sought leave to file a petition for a writ of mandamus against that order (Ninth Circuit Cause No. 22336). The motion was opposed and denied by this court on December 1, 1967, and application for reconsideration denied by this court on January 9, 1968. The Brief of respondent in that proceeding should be deemed incorporated herein to the extent that it shows appellant does not have the legal rights asserted and that there is no basis for issuance of a writ.

of mandamus", that pretrial proceedings in the cases below could continue and deferred consideration upon "respondents' [appellees'] motion to dismiss."

On February 23, 1968, Judge Pence adopted pretrial order No. 15, which provides in material part:

> 26. A pre-trial conference is set for June 5, 1968, at 9:30 A.M. in San Francisco, California, before Judge Martin Pence (D. Hawaii), with Judges George Boldt (W.D. Wash.), Alfonzo Zirpoli (N. D. Calif.), and/or such other judges as may be designated, present. At such time, after hearing, and after consultation with the other judges, Judge Pence will (a) select not less than three cases for separate trial; (b) select the districts in which such trials will be held; (c) determine the judge to preside in each such district; (d) determine whether other cases pending in any such district should be consolidated for trial; (e) formulate a final pretrial order for each trial case, setting such cases for trial at such times as will permit the orderly processing of three overlapping trials, with the first trial to commence before Judge Pence in either the Southern or Central District of California no later than June 24, 1968, and with each succeeding trial to commence thereafter at intervals of not less than two weeks each; and (f) take such action as is necessary for transfer or assignment of the designated cases to such judges. Among other things, the following matters will be considered:
>
> (A) The *voir dire* examination;
>
> (B) The form of a sumary to be read to the jury to explain the contentions of the parties and the issues;
>
> (C) The number of jury challenges permitted, the number of alternate jurors to be impaneled, and the necessity that a verdict be returned by a jury of twelve;

(D) Jury instructions and special interrogatories;
(E) Counsel's opening statements;
(F) The days and hours of the week during which court will be conducted;
(G) Designation of a spokesman if either plaintiffs or defendants have multiple counsel;
(H) Daily trial transcripts;
(I) A current index of the trial record;
(J) The handling of documentary evidence at trial;
(K) The scope of testimony of witnesses to be called at trial and possible limitations with respect thereto;
(L) The use of depositions, including possible use of narrative summaries or verbatim extracts;
(M) The parties' report on their attempts to stipulate as to facts;
(N) Further pre-trial proceedings;
(O) Rulings on objections to designated deposition testimony and documentary evidence, where possible.
(P) Possibility of settlement.

Pretrial order No. 15 has considerably clarified and made more explicit a fair and orderly procedure which has been implicit and known to the parties for over a year.

The new order defines the concept and limits of "practically simultaneous trials" to one of "overlapping trials . . . to commence . . . at intervals of not less than two weeks each," set in such a manner "as will permit the orderly processing" of all cases set for trial.

The new order makes perfectly clear that Judge Pence did not contemplate nor did Judges Boldt and Zirpoli propose to constitute themselves some three-judge constitutional court. Thus, the pretrial con-

ference is now set "before Judge Pence" and the other two judges will be "present" rather than having all three "preside." The cases to be tried will now be selected by Judge Pence rather than the three "trial judges" and thereafter there will be "such action as is necessary for transfer or assignment of the designated cases to the other judges for trial.[5]

ISSUE PRESENTED

1. Should Appellees' motion to dismiss be granted on the grounds that:

a. Appellant has shown no basis for granting the extraordinary relief requested, or

b. The challenged order is now moot.

2. May district judges set three cases for trial within such districts after they are ready for trial, after a hearing to determine trial times "as will permit the orderly processing" of the cases where the commencement of any of the trials must follow the commencement of any other trial by at least two weeks and no more than three cases in five districts will be so set for trial.

ARGUMENT

1. *Appellant's Motion to Dismiss should be granted.*

a. Appellant has in this proceeding retreated from the position maintained in the earlier mandamus proceeding. It no longer claims a constitu-

[5]No action is known to be required other than a minute entry or order signed by the judges concerned. While appellant concedes it has no "vested" right to have Judge Pence try all of the cases, it has suggested no possible way to avoid that result.

tional right to have a single lawyer represent it in all cases. Appellant now concedes the issue to be simply one of difficulty imposed upon any litigant and the courts where there is multi-district litigation involving numerous parties, with the possibility of over-lapping trials.

Although appellant presents the difficulties of the case as being the defendant's alone, the trial court and the parties themselves have always recognized that these difficulties are problems with which trial counsel for all parties are faced. During a pretrial conference concerning pretrial order No. 9, counsel for appellees succinctly expressed the effect of the court's order:

> "We know that under Pretrial No. 9, everybody's feet are going to be on the fire, our feet and Mr. Jansen's feet.
>
> "Mr. Jansen: The hotter you make it the better I like it." (App. 266)

As Judge Pence accurately stated the legal problem, the question of trial of the Pipe Cases required him to determine a

> "way in which these cases could be handled (1) with fairness to the plaintiffs and (2) fairness to the defendants and (3) fairness to the public." (App. 272)

Appellant has not shown any problem affecting its substantial rights nor any problem of trial different in degree or kind than that faced by appellees' counsel.[6]

---

[6]Indeed, appellees' problems in overlapping trials would seem more severe since the plaintiff must present his case first. Appellant continues to argue on what can only be called a reckless disregard for the facts, e.g., appellant's "single economic expert" opposed to "appellees' battery of experts." (App. Br. p. 15). Much of the pretrial conference during the past week was taken up with expert testimony. Appellant has a computer of its own and has at least as many expert wit-

More significantly, appellant has neither demonstrated nor claimed the existence of any problem which does not invariably exist whenever a party is faced with simultaneous or over-lapping trials in different districts. The Record, on the other hand, shows that Judge Pence proposes a plan which will alleviate these problems.

b. Whether or not considered as an appeal from the entry of or a petition for a writ of mandamus against carrying out pretrial order No. 14, the basis for invoking this Court's jurisdiction is no longer in existence. Appellees do not, however, urge that these proceedings be terminated for that reason. This is appellant's fourth submission to this court for relief from any possibility of having more than one case set for trial. In appellees' view, this issue was concluded by the Court's denial of leave to file a petition for writ of mandamus, but appellees must conclude that appellant will again appeal or seek a writ of mandamus or prohibition on account of the entry of pretrial order No. 15, which embodies the same concept.

Appellees submit that this Court should indicate that problems of trial setting and procedure are matters for the trial court, and that this Court will

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nesses on this case as do appellees.

Appellant formerly had a firm of attorneys representing it, but by virtue of pretrial proceedings, hired present counsel to supervise that firm's work and then found it possible, counsel says, to dispense with the previously hired firm and retain present counsel in the interest of saving half a million dollars a year.

Whether or not there are simultaneous, overlapping or successive trials the document problem will be the same—copies must be produced for introduction in each case where they are relevant—and will bear equally on appellees and appellant. The present plans contemplate minimizing this problem—see pretrial order No. 15, supra pp. 4-5.

not entertain continued attempts directed toward delay and interference with the efforts of the trial court to solve a difficult procedural problem in a fair and orderly manner. This is particularly true where, as here, the trial court has exercised as much care and patience in the solution of these problems as the Record indicates.

Costs and expenses incurred in these proceedings should be awarded to appellees.

2. *The concept of overlapping trials underlying the pretrial order may properly be applied by district courts.*

Appellant
~~Appellees~~ concedes:

> "If *coincidentally,* all [27 cases] had proceeded to trial simultaneously, appellant would not be in this Court seeking relief."
> (Br. of App., p. 12). (Emphasis by Appellant)

Appellees cannot conceive how appellant can ask for relief by this Court from an order limiting its exposure to three staggered trials separated by at least two weeks rather than to 27 simultaneous trials in five districts. No one could conceivably claim that these cases could all be tried separately, without considerable overlapping. Appellant urges bizarre and inconsistent notions. It says that simultaneous trials *by coincidence* would provide no basis for complaint. Nevertheless, appellant says, simultaneous or overlapping trials pursuant to a plan designed to eliminate as many logistic and procedural problems as possible is, somehow, prejudicial.

What appellants are attacking is a plan which would alleviate the very problems it poses and which at the same time, would permit the district courts to operate and dispose of this litigation in

an orderly and fair manner. Appellant's brief is simply an invitation to this Court to issue a declaratory judgement of its own views on disposition of this protracted litigation.[7] This Court, we submit, does not have sufficient information to do this; and we doubt whether the Court has either the power or inclination to do so.

There is no novelty in simultaneous trials, practically simultaneous trials or overlapping trials involving ordinary cases or, in large, multi-district antitrust cases. In the electrical cases, for instance, between September 18th and December 16, 1964, there were at least two and as many as four cases going on simultaneously in district courts in Missouri, Texas, California and Washington (see table annexed hereto as Exhibit "A"). Two cases were being tried simultaneously in district courts in New York and California between March 1st and March 10, 1965, and five days after conclusion of one case in New York another case commenced in Washington.

CONCLUSION

For some fourteen months appellant has raised every conceivable argument under every conceivable procedure and guise in the court below and in this Court to prevent any cases being set for trial. None of the issues raised have been in any realistic sense an actual situation, case or controversy. All have necessarily involved the assumption by appellant of presumed error, presumed prejudice, and assumed impossibility of conducting a fair trial in the light of appellant's forecast of the treatment to be accorded it.

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[7]Appellant itself pointed out that the procedures followed to date have saved it $500,000.00 per year (App. 247).

All of the hypothetical situations raised are clearly necessarily and properly within the discretion of district court judges in the conduct of their business—the disposition of causes by trial.

Appellant's chief concern is apparently that it might have to settle the cases because of a deliberately planned sequence of three overlapping trials. Since appellant concedes it would not be in this court if by coincidence it was facing 27 simultaneous trials, appellees cannot see how appellant has been prejudiced by the pretrial procedure adopted and indeed feels that there is given a clear advantage to appellant in eliminating that hazard.

Settlement has always been the last item on the agenda of the final pretrial conference. It is certainly true that the imminence of a trial or trials will force both parties to examine their positions with care and consider a reasonable settlement. It is, nevertheless, also true that parties to litigation sometimes use the costs and delay inherent in legal procedures to defer settlement consideration and make the law itself a settlement tactic—the familiar "courthouse step" settlement. It is also true that trials are frequently necessary and indeed the only solution to controversies which remain after reasonable people are unable to compose their differences. In any event, the possibility of settlement or its alternative both require that this Court permit the district courts to proceed as they have indicated with a reasonable and lawful method of disposing of this litigation in a manner no different from that which could be adopted in any litigation—the difference, if any, being in careful planning for appellant's benefit to avoid problems which might other-

wise fall upon appellant if the trials were left to happenstance.

The district courts, appellees, this Court and appellant should all be assured that these cases may and will move forward to trial and disposition, including overlapping trials if deemed necessary by the trial courts. Error and prejudice should not be presumed in advance of any trial. If error and prejudice should be suffered by either appellant or appellees it can and will be redressed upon appeal. Only on appeal, can any claim of error have a defined scope, context or meaningful analysis.

Appellant should know that it must be prepared for at least three overlapping trials, now deferred for at least three months. *Appellant has known this for some sixteen months and now has at least another three months to prepare for that eventuality.*

Appellant should know that the deliberate planning is for its benefit as much as for anyone else, and that the monetary savings it has achieved of over half a million dollars a year cannot be expected to continue forever.

Appellant's position is topsy turvy. It objects to a three judge meeting to plan a limited number of trials with the elimination of all possible trial problems because it is deliberate while conceding it could have no complaint if chance resulted in the very problems that the judges are seeking to solve. Appellee's chief concern here is that this Court should permit the district courts to dispose of this litigation by a reasonable method.

There must be an end to fruitless, bootless and essentially frivolous requests to this court for intervention in the setting for trial and trials of these cases by the courts below.

This proceeding should be dismissed and appellees awarded their costs and attorney fees with leave to apply to the courts below for a determination of damages for delay caused by these proceedings. Appellant's objection to the setting of cases for either "practically simultaneous" trial or for "overlapping trial" was and is frivolous, wanting in merit and manifestly taken for purposes of delay.

DATED at Seattle, Washington, this 23rd day of February, 1968.

Respectfully submitted

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CERTIFICATE

I certify that, in the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD MCL. DAVIDSON

TRIALS OF ELECTRICAL CASES

Start	*Stop*	*District*	*Docket Number*
3/16/64	6/2/64	E.D. Pa.	30015
9/18/64	15/5/64	W.D. Mo.	13290-3
9/8/64	12/17/64 & 15 others	W.D. Tex.	3064
10/6/64	12/16/66	Dist. of Col.	348-62
10/29/64	11/24/64	W.D. of Wash.	5271
2/16/65	4/21/65	S.D. N.Y.	62E-695
3/1/65	3/10/65	N.D. Cal.	8381
4/26/65	5/3/65	W.D. of Wash.	5385 & related
5/2/66	5/4/66	N.D. Ill.	61C-1278 & 16 related

Exhibit A